

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

RICHARD E. THOMAS,

Plaintiff, Cross-Defendant and
Appellant,

v.

ROBERT F. SINCLAIR et al.,

Defendants, Cross-Complainants
and Respondents.

C037926
(Super. Ct. No. SCV9517)

This case shows manipulation of the legal system by a wealthy and litigious man. Although he is an adjudicated vexatious litigant, his control over his attorneys allows him to evade the procedural hurdles applicable to such litigants.

(Code Civ. Proc., § 391 et seq.)

Sometimes attorneys overbill clients or render poor legal services. But most attorneys in private practice eventually find a client who refuses to pay an honest bill for no good reason. Demands of payment often result in claims of legal malpractice by clients seeking to avoid the day of reckoning. (See Kadushin, Law Practice Management (The Rutter Group 1997) § 18:119, p. 18-23 ["As a general rule, do not sue former clients for attorney fees! Doing so almost always results in . . . a cross-complaint for legal malpractice."] (Kadushin).)

What is different here is that a wealthy and sophisticated litigant (Richard E. Thomas, sometimes doing business as Environment and Land Management, Inc.) induced a lawyer to expand his services to include appellate services, and promised to keep current on his bills, while secretly intending to pay as little as possible, refuse full payment and raise spurious claims of malpractice to coerce settlement of earned fees.

The trial court found Thomas liable to the lawyer, Robert Sinclair and his firm (Sinclair, Wilson & Bedore) for promissory fraud, and awarded substantial compensatory and punitive damages. On appeal Thomas contends Sinclair's election of the remedy of fee arbitration bars this action, and no substantial evidence supports liability or damages. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because Thomas asserted Sinclair committed malpractice in the underlying case (*Thomas v. Rowland* (March 13, 1998) 3 Civ. No. C024235, nonpub. opn., and related proceedings), we will set forth an account of that case. Then we will set forth the procedures leading to trial in this case and the evidence.

A. The Parties

Sinclair was experienced in real estate law and enjoyed high professional standing. He had handled appeals and had been a staff attorney at the California Supreme Court. Expert testimony by Robert K. Puglia, a retired Presiding Justice of this court, showed there was no hint of malpractice committed by Sinclair in *Thomas v. Rowland*.

Thomas falsely painted himself as a humble property manager with cash flow problems. After Thomas sued Sinclair, Sinclair learned the truth. Thomas had earned a master's degree in Business Administration in 1967, and his company manages real estate and acts as a real estate broker and general contractor; Thomas is licensed as both. He owns most of the property managed by the company. As of the date of trial, he owned over 40 income producing properties in the Bay Area. Thomas's business requires him to deal with evictions, employment of contractors and property managers, and municipalities in five counties, and he has been doing this for 25 years. Since 1990

he has retained *hundreds* of attorneys. In the past decade he testified in court about *300 times* and gave over 20 depositions. In the year before trial he paid over \$150,000 in attorney fees in the course of his business. He claimed he only had five or six fee disputes with those attorneys. He testified that of "maybe 15" malpractice cases he admitted to filing in the past decade, 11 related to a child custody matter or to a default civil judgment entered against him. However, other disputes with lawyers were unrelated to those cases.

Thomas often filed his malpractice actions in *propria persona* or ordered them to be filed by his in-house lawyers. Since at least 1992, Thomas would place advertisements in a legal paper for in-house counsel. He particularly sought lawyers experienced in legal malpractice. On this and other matters at trial, Thomas waffled or claimed an inability to recall.

The record contains many documents written by Thomas which reflect his grasp of business, real estate, and litigation, and he often gave Sinclair suggestions. He was Sinclair's "most involved client," including lawyer-clients. When it suits Thomas, he pleads ignorance of the law or other excuses for lack of clarity, including learning disabilities. He also claimed billing problems were caused by inept employees.

B. The Underlying Case

Thomas had a contract to buy a house in Placer County from Craig Rowland, who sold it to Patrick Wilson. Thanks to Sinclair's efforts, Thomas walked out of escrow with the property *for nothing*. The moment escrow closed, Thomas blamed Sinclair for churning the file and failing in his duties, though he had voiced no such complaints before.

Former attorney James McDonald began a suit on Thomas's behalf against Rowland, Wilson and Carolyn Brodt. Sinclair agreed to take over the case in February 1990.

Sinclair understood that Thomas had a relative renting the property and that Thomas entered into a contract to buy the property from Rowland and Brodt. Thomas wanted to provide a home for his relative. A dispute developed, Rowland treated the contract as no longer binding, and instead sold the property to Wilson. Sinclair's trial theory was that Rowland misunderstood his ability to obtain a lot split and therefore breached the contract. Because Rowland had acted on the basis of legal advice, there was no claim he acted intentionally. Thomas approved this strategy. Later, while the case was on appeal, Thomas complained that Sinclair had not pursued a fraud theory and then went so far as to sue Rowland in a separate lawsuit, which he kept secret while Sinclair was trying to negotiate a settlement.

Early in *Thomas v. Rowland*, Sinclair dealt with McDonald, but McDonald's relationship with Thomas soured. McDonald gave favorable deposition testimony, but as trial approached there was a concern he would turn on Thomas. Thomas wrote a letter to Sinclair warning of McDonald's "volatility." Sinclair recommended that McDonald not be called to testify, but made it clear that the choice was Thomas's, and Thomas followed Sinclair's advice. Thomas later wrote several letters suggesting that not calling McDonald had been Sinclair's dubious choice. Sinclair saw this as an effort to shift blame in case of a poor outcome.

Thomas was billed monthly for legal services and there was no provision allowing for arrearages. Thomas was regularly behind in payments. In 1992, Judge John Cosgrove ruled in favor of Thomas and awarded specific performance. When Thomas learned of the decision he wrote a letter congratulating Sinclair on his "victory over [Rowland's then-attorney] and the forces of evil." Within days, Thomas paid off his balance of about \$13,600. Within days of Judge Cosgrove's 1996 favorable ruling on a lost rents damages issue, Thomas paid his balance of about \$22,000. Sinclair did not then perceive this payment pattern to be sinister because he thought (wrongly, based on Thomas's misstatements) that Thomas was a man of modest means who had cash flow problems. In reality, Thomas paid as little as he

could so as to leave large balances when issues were pending in court: In the event of an adverse outcome it would be up to Sinclair to sue. This became evident when Sinclair prepared a chart comparing the billing history with litigation events.

Sinclair cautioned Thomas that rents he might have received had escrow closed promptly were not worth asking for; they were ultimately awarded only because Rowland's former attorney failed to demand offsets. Thomas wanted Sinclair to argue for the rent money. Sinclair was surprised when Judge Cosgrove awarded these damages and advised Thomas in writing that they would be reversed. Sinclair was correct. On March 13, 1998, we affirmed specific performance but, based on *Ellis v. Mihelis* (1963) 60 Cal.2d 206, concluded lost rents should be fully offset by interest which would have been earned on the purchase price.

At that point Sinclair and John Dutton, Rowland's new attorney, agreed that about \$102,000 of escrow offsets were due Thomas. Sinclair moved to amend the judgment, get attorney fees pursuant to the contract and obtain possession. The parties tentatively settled in such a way that Thomas would receive enough credits in the escrow (about \$50,000 on top of the \$102,000) that he would not have to pay for the property, nor contribute toward the escrow fees. In January 1999, while another appeal was pending (3 Civ. No. C027675) Thomas and

Rowland executed a settlement. Thomas's credits in escrow accounted for *all* billings, paid and unpaid, by Sinclair. Escrow closed in March 1999, at which time Thomas owed Sinclair over \$21,000. Thomas received back his escrow deposit plus interest, of more than this amount. Instead of paying Sinclair, Thomas immediately demanded his file and contested his bill.

C. Thomas v. Sinclair

Thomas demanded arbitration of *all* billed fees under the State Bar's fee arbitration system. (Bus. & Prof. Code, § 6200 et seq.) He estimated that the fees totaled \$120,000. On October 29, 1999, Placer County Bar Association (PCBA) arbitrator Ashton Harrington issued her award, detailing what had taken place leading up to the hearing held on September 29, 1999. This included attorney Frank DeBenedetto's false claim that Sinclair wrongly withheld the file, Thomas's false claim that DeBenedetto was not authorized to represent him, attorney James Beck's challenge to the initial arbitrator lodged to obtain a continuance which had been repeatedly denied, further continuances requested by Beck (one due to Thomas's claim that he got sick from a bad hot dog), Thomas's failure to cooperate in rescheduling the hearing and his refusal to attend the hearing. Harrington concluded Thomas "embarked upon a practice of delay designed to frustrate respondent's recovery of unpaid compensation" and his failure to appear was willful and in bad

faith. She awarded Sinclair all his fees, the unpaid portion of which, with interest, amounted to about \$21,000.

On September 27, 1999, Thomas sued for malpractice in Alameda County, his residence; Sinclair had the case transferred to the proper venue, Placer County.

Sinclair and his firm filed a cross-complaint which partly claimed fraud, alleging Thomas had had no intention to pay for appellate work, that Sinclair relied on Thomas's contrary false promise and sustained losses in the amount of the unpaid fees. Sinclair also sought punitive damages.

On the same date, Sinclair moved to confirm the fee award. Thomas opposed the motion, claiming in part that an unnamed malpractice expert gave him an opinion on August 27, 1999, that there were grounds to fault Sinclair's services and arbitration was not a proper forum to resolve malpractice issues. Judge Frances Kearney confirmed the award on March 21, 2000.

Thomas answered the cross-complaint, raising seven affirmative defenses. Thomas did not claim the fee award barred the cross-complaint or raise res judicata.

At a case management conference on April 24, 2000, Judge Larry Gaddis set trial for October 17, 2000.

On August 25, 2000, Thomas disclosed his expert witnesses. Thomas asserted Elizabeth England was an expert on the legal standard of care, that she would testify Sinclair failed to meet

this standard, *and that she had agreed to testify at the trial* (still set for October 17).

Between filing the malpractice complaint and the date of trial, Thomas conducted almost no discovery (only sending form interrogatories and requests for admissions), and frustrated Sinclair's lawful discovery efforts.

On October 3, 2000, Thomas moved to continue trial because (1) he had "recently" (*as of July 31*) retained Patrick Lund, and (2) England was not available. Judge James Garbolino denied the motion on October 10.

On October 12, 2000, Sinclair moved to prohibit Thomas from calling England to testify because she (and other experts) had not been made available for depositions. He attached her letter, dated October 2, informing Lund of commitments *from August 18, 2000, through October 25*. She had not been available for trial as had been claimed.

Sinclair sought items of damage we detail later. He was given leave to amend the prayer to conform to proof.

The October 17, 2000 trial was delayed by one day because of Thomas's peremptory challenge of Judge Gaddis. The case was assigned to Judge James Roeder for the next day. Neither Thomas nor Lund appeared; former counsel Beck appeared, claiming Thomas had the flu.

Thomas had filed a motion to replace witness England, claiming he had "tentatively" retained a new expert. Judge Roeder denied the motion and ordered Lund and Thomas to appear on October 23, 2000.

In a document prepared October 18, 2000, and filed October 23, Thomas dismissed his complaint. Judge Garbolino continued the case to November 13, 2000.

On October 31, 2000, Thomas paid Sinclair's bill with a letter stating the checks for principal and estimated interest were tendered without conditions, not as a settlement. Thomas claimed this eliminated any fraud damages. Sinclair testified he was still owed \$5, and Thomas paid that during trial.

A court trial before Judge Roeder began on November 13, 2000. Thomas did not appear and Lund asserted Thomas had bleeding hemorrhoids; Judge Roeder commented on Thomas's prior alleged flu and found his claims "suspect." However, he continued the trial to November 27, 2000.

On November 27, 2000, neither Thomas nor counsel appeared and trial began without them. The court excluded evidence of Thomas's status as a vexatious litigant and granted the motion to exclude his experts. As Sinclair introduced surveillance indicating Thomas's prior claim of illness was false, Lund appeared. Thomas and Beck appeared separately, shortly thereafter.

We note that in the middle of trial, Thomas tried to disqualify Judge Roeder, who had rejected Thomas's claim that payment of Sinclair's bill obviated the fraud claim.

McDonald testified that although he resigned from the State Bar in 1986, he worked for Thomas beginning in 1987. He replaced Thomas's former in-house counsel. Thomas learned McDonald was not licensed, but used him to hire other lawyers, including Sinclair, and McDonald remained "in-house counsel" until May 1990.

Another of Thomas's in-house attorneys, Douglas Watts, worked for Thomas out of economic necessity. Around February or March 1997, Thomas discussed with Watts and DeBenedetto the idea of suing one or two prior attorneys (Byron Thompson and Steven Mendelsohn). Watts did not want to, but Thomas encouraged him, saying "what's the big deal? This is a piece of cake, here." Thomas showed Watts a malpractice complaint he had filed "and said basically all you've got [to] do is take this name out and put the new name in and get it all together and file it." "[T]his sort of thing is easy money, what's so hard about this? All you do is put the lawsuit together, you serve it to the guy, he turns it over to his malpractice carrier and a few months later somebody cuts Thomas a check."

Watts filed suit on Thomas's behalf against Thompson, although no malpractice expert had been consulted, and Thompson

obtained summary adjudication. Watts also filed suit against Mendelsohn, as Thomas insisted, but the case was dismissed when Thomas failed to appear at trial. When Thomas wanted a case filed, Watts complied. Watts did not think these lawsuits were brought in good faith.

In an unusual deposition procedure crafted by Judge Gaddis, Watts had given the following testimony introduced at trial: Throughout the time Watts worked for Thomas, Thomas insisted that he advance claims ``regardless of my opinion'' and engage in ``relentless'' litigation ``way beyond the bounds of anything that was called for[.]'' Thomas told Watts he had ``a general kind of philosophy about filing lawsuits against lawyers[.]''

We note that a declaration Watts filed in Thomas's lawsuit accusing *Watts* of malpractice, introduced into evidence in this case, states Thomas often used false claims of illness to avoid appearances. That appears to have occurred in this case, both in the arbitration and before Judge Roeder.

When asked directly, by his own counsel, whether he had told Watts about how easy it was to sue for malpractice, Thomas answered: "I don't recall making that statement. And I surely would have recalled because the statement was not a true statement of fact." These and similar passages led the trial court to conclude Thomas lacked credibility.

Lorraine Walsh worked on some of Thomas's cases as an associate for Walter Moeller. When one case was lost, Thomas filed a frivolous malpractice action against the firm. After the firm spent 75-100 hours defending itself, Thomas paid money pursuant to a confidential agreement.

Another attorney testified she settled a spurious malpractice claim, one of several arising out of Thomas's family law proceeding, to avoid embarrassment in the legal community, of which she was a prominent member with judicial aspirations. The lawsuit caused her out of pocket losses, increased malpractice premiums and lost time.

Thomas testified some of his malpractice cases were settled with an agreement that no malpractice occurred, which he viewed as an accommodation to spare the reputation of the attorneys. Thus, Thomas knows that some attorneys are willing to settle malpractice claims to avoid publicity. (See Kadushin, *supra*, § 18:119, pp. 18:23-24.)

The written fee agreement (with the former firm Sinclair, Wilson & Sinclair) provided Sinclair would represent Thomas through "post-trial motions" at \$125 per hour. After Judge Cosgrove's August 1996 decision awarding lost rents, Sinclair alerted Thomas to the likelihood of an appeal, but by this time he was fed up with Thomas's arrearages of around \$20,000 and his "insulting" payment history. Sinclair wanted Thomas to pay his

bills promptly and to begin paying the higher hourly rate (\$175) the firm (by then Sinclair, Wilson & Bedore) charged. He was concerned about taking on the appeal because he believed it was more difficult to withdraw from an appellate court case than a trial court case, regardless of client payment problems.

Sinclair testified that Thomas orally agreed to these points in December 1996. In his view, State Bar rules did not require a writing. At no time did Thomas object to the new billing rate as shown on his monthly statements. However, Thomas still did not pay his bills promptly, stating he had cash flow problems. Sinclair asked what Thomas could afford to pay and Thomas "suggested \$2,500." "I recall one letter where he specifically said his whole livelihood was tied up in the [Rowland] litigation and he had to drive an 11-year-old Volvo because of it." Thomas still did not comply.

When asked by his own counsel whether he discussed an appeal agreement with Sinclair, Thomas gave another controlled answer: "Not that I can recall. And I would have a specific recollection if I did . . . since it dealt with things that needed to be modified in writing."

Thomas claimed he did not review the bills carefully and did not realize the hourly rate had changed until he fired Sinclair, but he had complained about minute points on some bills and admitted he reviewed and made suggestions about legal

documents. He conceded he brought his balance current by January 1997, which Sinclair had testified was a necessary condition to the deal. Thomas claimed he had a deal to pay \$2,000 per month and denied telling Sinclair he could not afford to pay more.

Thomas made an offer of proof that he had a net worth of \$23,000,000. Sinclair made an offer of proof that in 1997 Thomas had \$22,000,000 in Bay Area real estate, that an expert would testify those properties "have at least doubled in value" and that in 1997 Thomas also had "at least" \$1,000,000 in liquid assets. The court accepted these offers of proof as evidence, with the concurrence of the parties.

By December 1997, while *Thomas v. Rowland* was on appeal, Thomas wanted Sinclair to pursue a fraud action because new evidence indicated Rowland's sale to Wilson had been a sham. Sinclair testified Thomas "continuously" wanted to raise new claims. In letters of August 1997 and January 1998, Sinclair advised Thomas against getting distracted from the goal of getting the property. By January 1998, Thomas owed Sinclair over \$17,000 and had not made any payment for months.

In February 1999, Thomas brushed off Sinclair's efforts to discuss payment of the arrearages (then over \$20,000) out of the expected escrow refund of Thomas's deposit. Apart from a minor billing issue from years before (amounting to a couple of

hundred dollars which Sinclair wrote off), and a complaint about Sinclair's unavailability for a few weeks during a relative's fatal illness, Thomas had never complained about the billings or about Sinclair's work prior to close of escrow. By letter dated February 11, 1999, Sinclair reviewed all of these issues thoroughly and told Thomas he would not represent him past close of escrow.

On March 12, 1999, Thomas faxed a letter to Sinclair claiming he was confused about various things, and asserting that Sinclair was responsible for overseeing escrow. A few days later Sinclair sent a reply in part emphasizing that he had not been engaged to supervise the escrow and that he would not do so unless his bill was paid. At trial Thomas admitted that he did not expect Sinclair to handle things like escrow instructions, but testified the escrow process "was complicated" and he wanted Sinclair's involvement. But in deposition Thomas had said involving attorneys in the escrow would make the process harder. Given Thomas's business acumen, broker status and employment of in-house counsel, his claim that he needed Sinclair's help to get through an escrow defies belief.

About *20 minutes* after escrow closed on March 19, 1999, Thomas faxed a letter to Sinclair demanding his file, accusing Sinclair of being unwilling to help obtain title to the property. Thomas claimed Sinclair had withheld information and

this had delayed close of "a straightforward sale transaction" to churn the file. He demanded fee arbitration.

Thomas then created bogus complaints about the file copying and delivery process, complaining to Sinclair, PCBA and the State Bar: In reality, Sinclair reasonably complied with Thomas's request and the file "sat . . . on the floor of my office for six weeks or so" while Thomas was complaining and refusing to pick it up.

Sinclair hired lawyers to change venue and reported this lawsuit to his insurance company, which hired lawyers to defend him. Defense fees totalled \$134,018 before Thomas dismissed the complaint. Sinclair's time defending the suit amounted to lost income of \$33,600. The firm had an increase in malpractice premiums of \$28,800 over eight years. Sinclair claimed emotional distress due to lost reputation in the community, due to the existence of a malpractice case on the court's calendar. The case would have to be disclosed if he applied for a judicial position or if he again testified as an expert.

Thomas denied Sinclair's damning evidence, portrayed himself as a victim of unscrupulous lawyers and asserted he had contested Sinclair's billings in good faith.

At the end of trial the court invited the parties to file closing briefs and stated he would announce his decision from

the bench on December 18, 2000. Neither Thomas nor Lund appeared; attorney William Dunbar appeared for Thomas.

No party requested a statement of decision. Although the oral decision cannot be used to impeach the judgment (*Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 551-552), it can be helpful to guide us in reviewing the evidence and to explain the trial court's reasoning. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 344-346, pp. 387-391.)

After reciting that Thomas "essentially only paid his legal fees after a successful result" such as after Judge Cosgrove's decisions in 1992 and 1996, the trial court found the parties entered into a new agreement "in consideration for Mr. Thomas' oral promise to pay his legal bills promptly and in full." Thomas received a very favorable result, yet he refused to pay Sinclair out of the money received from escrow. "The tone and content of Mr. Thomas' letters to Mr. Sinclair and the law firm during the course of the litigation, this Court finds evidences an early intent by Mr. Thomas to set the stage for later refusing to pay his legal bills. An example of that, of course, is the questioning of the decision to not call Mr. McDonald as a witness. Mr. Thomas repeatedly promised to pay his legal bills, but did not." The court noted Thomas's bad faith conduct in the arbitration, as well as the numerous malpractice cases which reflect his "motive, intent, preparation, plan and knowledge to

perpetrate the promissory fraud in the manner in which it was conducted[.]”

The court also emphasized Thomas’s demeanor in court: “I find that his testimony was controlled, intentionally vague and calculating in nature and content. This Court finds that Mr. Thomas is a very knowledgeable litigant. He is educated, experienced and has a high degree of business savvy and sophistication. The Court further finds that Mr. Thomas’ conduct in this case clearly evidences his continuing irresponsible use of the Courts to implement his documented practice and his gamesmanship with regard to his employment of legal counsel” In short, Thomas was not credible.

The court awarded malpractice defense costs (\$134,018), increased premium costs (\$28,800), and lost earnings (\$33,610), all totalling \$196,428; emotional distress damages of \$50,000 and punitive damages of \$690,000.

Thomas moved for a new trial due to insufficient evidence, excessive damages and legal error. He also moved to set aside the judgment. Thomas argued the fraud action was barred by an election of remedies. In his reply, Thomas argued Sinclair had shoehorned a *malicious prosecution* action into a fraud action. Sinclair moved for an attorney fee award based on Thomas’s bad faith malpractice claim.

The court denied Thomas's motions and granted Sinclair's motion, awarding \$134,018 as an alternative fee award, under "the 'vexatious litigant' doctrine," in case the \$134,018 damage award were reversed on appeal.

II. DISCUSSION

A. The Fee Arbitration did not Bar the Promissory Fraud Action

For various reasons Thomas claims the confirmed arbitration award barred Sinclair from obtaining a tort judgment. Not so.

1. Election of Remedies

Thomas contends Sinclair waived his fraud claim by his election to confirm the arbitration award. Thomas's nonpayment of earned fees was a breach of contract. Assuming that it was also an outgrowth of his fraud, Thomas argues that because Sinclair had the fee award confirmed, Sinclair "elected" the contract remedy and cannot obtain a tort remedy.

The doctrine of "election of remedies" of late has been criticized (e.g., *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 101; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 138 (Glendale); *Perkins v. Benguet Consol. Min. Co.* (1942) 55 Cal.App.2d 720, 755-756 (*Perkins*)) and the doctrine is better characterized as requiring an election between inconsistent rights. "The doctrine of election of remedies, often invoked in the earlier cases, has been repeatedly criticized and seems to

be falling into disfavor. Later California decisions illustrating binding election are comparatively rare, and the bar to a remedy is sustained on the principles of estoppel or res judicata rather than election. . . . [¶] Modern writers have contended that the only sound explanation for any doctrine of election of 'remedies' is that, in some situations, there may be a required choice of substantive rights. Thus, no person would be entitled to claim two inconsistent rights [citation], but he would be free to select and change his alternative remedies or legal theories of recovery, by amending the complaint or by filing a new action, until such time as one of his inconsistent rights was finally vindicated by satisfaction of judgment or by the application of the doctrines of res judicata or estoppel." (3 Witkin, Cal. Procedure, *supra*, Actions, § 175, p. 245.) The doctrine is an iteration of equitable estoppel and is applied to avoid an injustice, not create one; it will not be applied unless a plaintiff "affirmatively pursues a particular remedy to defendant's disadvantage." (*Baker v. Superior Court* (1983) 150 Cal.App.3d 140, 144-145; see *Waffer Internat. Corp. v. Khorsandi* (1999) 69 Cal.App.4th 1261, 1269-1270 [doctrine eased harsh former law allowing attachment without notice].)

The doctrine is not applicable herein for five reasons.

First, although normally an order confirming a fee arbitration award may be a judgment where that is the only issue in the case (Bus. & Prof. Code, § 6203) here the order was entered after the cross-complaint was filed and it did not dispose of all causes of action before the court. It was not a judgment. (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1545-1548; see *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) Sinclair did not pursue the contract claim to fruition and had no need to elect until judgment, viz., resolution of the cross-complaint. (See *Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1039-1040 [no need to elect before judgment]; *Perkins, supra*, 55 Cal.App.2d at p. 755 ["a party may pursue one or all of such remedies until satisfaction is had"]; 3 Witkin, Cal. Procedure, *supra*, § 180, pp. 251-252; cf. *Lake v. Lakewood Chiropractic Center* (1993) 20 Cal.App.4th 47, 54.) Thomas repeatedly states that he "satisfied" the arbitration "judgment" by paying Sinclair. Not so. His checks were tendered without conditions as payment on his account. They did not satisfy a judgment. There was no judgment to satisfy.

Second, Sinclair had no alternative but to pursue fee arbitration. (See 3 Witkin, Cal. Procedure, *supra*, § 186, p. 257 ["If . . . only one remedy was available . . . he had no choice, and cannot be deemed to have made an election"].) When

Sinclair sent his final bill and demand for payment, Thomas demanded arbitration. Arbitration was then mandatory for Sinclair. (Bus. & Prof. Code, § 6200, subd. (c).) Thomas acted in bad faith in the arbitration, but his failure to appear did not relieve Sinclair of the statutory duty to participate. The fee arbitrator had the authority to determine whether arbitration had been waived, not Sinclair, as Thomas suggests. (*Manatt, Phelps, Rothenberg & Tunney v. Lawrence* (1984) 151 Cal.App.3d 1165, 1170-1171 (*Manatt*).) That Sinclair thereafter sought to have the resulting award confirmed does not represent an election to abandon other damages he suffered at Thomas's hands. He was just caging the bird in the hand.

Third, the remedies are not inconsistent. Generally fraudulent inducement of a contract and breach of contract are not inconsistent. (*Baker, supra*, 150 Cal.App.3d at pp. 145-146; see *Glendale, supra*, 66 Cal.App.3d at p. 137; 3 Witkin, Cal. Procedure, *supra*, § 193, p. 261. Cf. *Roam v. Koop, supra*, 41 Cal.App.3d at p. 1040 [no bar until some positive election takes place, such as attachment without notice].) Here, the contract remedy was not inconsistent with a tort remedy. It was *duplicative*, inasmuch as Sinclair could not recover overlapping damages, but it was not *inconsistent* such that an estoppel should arise.

Fourth, Thomas has not been prejudiced in any way by the award. Election of remedies, "bottomed upon the equitable principle of estoppel, operates only where pursuit of alternative and inconsistent remedies substantially prejudices the defendant." (*Glendale, supra*, 66 Cal.App.3d at p. 137; see 3 Witkin, Cal. Procedure, *supra*, § 195, pp. 263-265.) Thomas cites *Smith v. Golden Eagle Ins. Co.* (1999) 69 Cal.App.4th 1371, but that case illustrates why he cannot invoke election of remedies. Smith sued a defendant in tort and thought a settlement had been reached. Instead the case went to trial and Smith lost, resulting in an adverse judgment which he did not appeal. Smith filed a breach of contract suit against the parties to the purported settlement. Because Smith pursued the underlying tort case to a final judgment (albeit an unfavorable one), allowing him to sue for breach of contract "would be inconsistent and unfair to defendants." (*Id.* at p. 1376.) In contrast, the order confirming the arbitration award in this case gave Sinclair no tangible advantage and caused Thomas no harm.

Finally, when it became clear to Thomas that Sinclair was not going to offer him a quick settlement to avoid a malpractice claim, Thomas tried everything he could think of to frustrate the arbitration. He said he did not appear because he had a good faith belief that he could not raise malpractice in the

arbitration, but the trial court could reject this explanation. It is commonplace for clients to raise malpractice issues at fee arbitration hearings. (See *Olney v. Sacramento County Bar Assn.* (1989) 212 Cal.App.3d 807, 812-813.) The arbitrator cannot award affirmative relief, but can reduce the bill for malpractice, down to zero. (Bus. & Prof. Code, §§ 6200, subd. (b)(2), 6203, subd. (a).) Thomas's claim on appeal that he was barred "from raising any issue with respect to the standard of care in the fee arbitration" is simply wrong. Thomas was represented by counsel who presumably could look up the law and discover that malpractice could be asserted as an offset, without prejudicing Thomas's right to pursue affirmative relief in a malpractice suit. (Bus. & Prof. Code, § 6204, subd. (e).) The trial court could conclude Thomas's reason for not participating in the arbitration was a sham, and he was just playing games, as the arbitrator concluded. This illustrates that far from being prejudiced by Sinclair's actions in participating in the arbitration, seeking confirmation of the award, and then pursuing the fraud claim, Thomas's tactic of demanding and then frustrating the arbitration was designed to prejudice Sinclair. (See *Manatt, supra*, 151 Cal.App.3d at p. 1173.) Therefore, his "unclean hands" precludes Thomas's invocation of the equitable bar of election of remedies, were it otherwise available, which it was not. (5 Witkin, Cal.

Procedure, *supra*, Pleading, § 1052, p. 502; *Katz v. Karlsson* (1948) 84 Cal.App.2d 469, 473-475.)

For each of these reasons, the election of remedies doctrine does not equitably preclude Sinclair's fraud claim.

2. Res Judicata

Thomas contends the order confirming the fee award barred the fraud action under the doctrine of res judicata. Res judicata was not mentioned in the trial court. The point is waived. (*Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1191; see 7 Witkin, Cal. Procedure, *supra*, Judgment, § 291, p. 836.)

Further, the claim lacks merit. A case relied on by Thomas illustrates why. In *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, a homebuyer filed suit to correct a construction arbitration award which favored the builder; that action was stayed. He then filed a second suit against a subcontractor, who asserted the arbitration award barred the claim. (*Id.* at pp. 752-754.) The court held the unconfirmed award barred the second suit, in part because it looked at the motion to correct the award and, observing it only addressed attorney fees, concluded: "An eventual decision on the petition to correct will not otherwise affect the substance of the arbitration award." (*Id.* at pp. 758-761.) In that context, treating the unconfirmed award as a bar to a later suit was unobjectionable. But here, the order confirming the award was entered in the *same* action in which

Thomas belatedly seeks to interpose res judicata. It was not a final judgment, a necessary element of res judicata. (7 Witkin, Cal. Procedure, *supra*, Judgment, §§ 306-307, pp. 856-857.) Therefore, it did not bar this suit.

3. Motion to Vacate the Judgment

Thomas contends his motion to vacate the judgment should have been granted because the superior court had no *subject matter jurisdiction* to adjudicate the fraud claim. He contends the State Bar statutes evidence an intent to preclude lawyers from pursuing clients in court. Not so.

"The policy behind the mandatory fee arbitration statutes . . . is to alleviate the disparity in bargaining power in attorney fee matters which favors the attorney by providing an effective, inexpensive remedy to a client which does not necessitate the hiring of a second attorney. [Citation.] The process favors the client in that only the client can elect mandatory arbitration of a fee dispute; the attorney must submit the matter to arbitration if the client makes that election." (*Manatt, supra*, 151 Cal.App.3d at pp. 1174-1175.)

This general policy does not change the fact that an attorney may sue a client if, as took place herein, the attorney provides the client with notice of the right to arbitration. (Bus & Prof. Code, § 6201, subd. (a).) Sinclair complied, and also participated in the arbitration invoked by Thomas. The

issue resolved in that proceeding did not preclude Sinclair from pursuing Thomas in tort, and the statutes cited by Thomas do not cut off the trial court's ordinary subject matter jurisdiction to hear tort claims. (See Cal. Const., art. VI, § 4; *Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 362.)

In the reply brief Thomas characterizes the fraud award as an improper judicial modification of the fee arbitration award. We disagree: The tort judgment was not a modification of the arbitration award.

Thomas suggests Sinclair *avoided* arbitration. We disagree. Sinclair participated in the arbitration invoked by Thomas. But at oral argument Thomas asserted that *any dispute* regarding fees must be arbitrated, and because the gist of the alleged fraud was linked to the fees, the claim of fraud had to be asserted by Sinclair in the arbitration. Therefore, because Sinclair failed to raise the fraud issue in the arbitration, he effectively (and wrongly, in Thomas's view) "avoided" arbitration to that extent, frustrating an important mechanism to protect consumers of legal services. Business and Professions Code section 6021 provides for a system to arbitrate "any . . . proceeding against the client . . . for recovery of fees, costs, or both." We see nothing in the statute which indicates an attorney could recover in a fee arbitration an amount greater than his or her fees and costs. Nor do we see anything that precludes a lawyer from

suing a client in tort. The cases cited by Thomas for the proposition that arbitrators may consider the fraudulent inducement of a contract involve contractual arbitration and parties seeking to *avoid* a contractual arbitration provision, alleging the contract was procured by fraud. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323; *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1094-1095; *Hayes Children Leasing Co. v. NCR Corp.* (1995) 37 Cal.App.4th 775, 780-781.) Here, Sinclair did not try to avoid arbitration, he is seeking damages not subsumed within the scope of the arbitration. The effect of Thomas's proposed rule, if adopted, would allow an attorney to recover damages in fee arbitration in an amount greater than the claimed fees and costs. The statutory language does not support such a result and such result would discourage clients from invoking fee arbitration, frustrating the statutory purpose.

B. Sinclair Presented Substantial Evidence of Fraud

Thomas asserts the judgment "should be reversed for lack of evidence of fraud." Within this heading he raises a number of subsidiary points, none of which have merit.

"Under the often-enunciated rule, which is so often forgotten in the enthusiasm of advocacy, we look to the evidence accepted by the trial court." (*Findleton v. Taylor* (1962) 208

Cal.App.2d 651, 652; see *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142.)

Fraud consists of (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud (induce reliance); (4) justifiable reliance; and (5) damage. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) A cheat is liable for "the amount which will compensate for all the detriment proximately caused" by fraud, "whether it could have been anticipated or not," and may be liable for punitive damages. (Civ. Code, §§ 3333, 3294; *Lazar, supra*, 12 Cal.4th at p. 649.) "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." (Civ. Code, § 1709.) The recovery puts the victim in the position he would have held, absent the fraud. (See *Stout v. Turney* (1978) 22 Cal.3d 718, 725; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 568 ["all the detriment proximately caused"] (*Salahutdin*).)

"An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. 'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition

to his cause of action on the contract.'" (*Lazar, supra*, 12 Cal.4th at p. 638.) "In pursuing a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. [Citation.] Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for 'predictability about the cost of contractual relationships' [citation], fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the-bargain damages." (*Id.* at p. 646.)

The failure to perform a promise is not a tort. (*Rheingans v. Smith* (1911) 161 Cal. 362, 366.) "[F]raudulent intent must often be established by circumstantial evidence. Prosser . . . cites cases in which fraudulent intent has been inferred from such circumstances as defendant's . . . failure even to attempt performance, or his continued assurances after it was clear he would not perform." (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30.) A party may justifiably rely on a promise, a statement of present intention. (Rest.2d Contracts, § 159, com. (d), p. 429, § 171(2), coms. (a), (b), pp. 466-467; Prosser & Keeton, Torts (5th ed. 1984) § 109, pp. 762-763.)

The testimony of a single witness is enough to support a finding, unless it is inherently incredible or unreliable. (See *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660; *Menning v.*

Sourisseau (1933) 128 Cal.App. 635, 639.) Sinclair's testimony about the terms of the December 1996 agreement was credible and was corroborated by the facts that the 1990 agreement did not include the appeal, Thomas paid off his balance in January 1997, and Thomas never objected to the higher hourly rate.

Thomas disputes the evidence that he harbored a secret intention not to follow the December 1996 agreement, and indeed, denies the existence of such agreement. The evidence, viewed in favor of the judgment, shows Thomas never intended to pay his bills promptly, but instead planned to leave the case with a large balance and plead malpractice to extort a reduction in the bill. He had filed other frivolous malpractice cases. He bragged to his own attorney, Watts, shortly after the new agreement with Sinclair, that it was easy to get out of paying legal bills by raising sham claims of malpractice. He fell behind in payments when issues were pending in court, then came up with large enough payments at critical times to placate Sinclair. He was rich and had the ability to make prompt payments but misrepresented his financial condition to avoid doing so. Given these facts, the trial court's conclusion about Thomas's bad intent is amply supported by the record.

We now briefly address Thomas's specific contentions.

1. Standing

Pointing to principles of partnership law, Thomas contends *Sinclair* has no standing to sue him for fraud because the written fee agreement was with Sinclair, Wilson & Sinclair. We agree with Sinclair that Thomas's failure to raise this issue in the trial court results in a waiver. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 394, p. 444.) Thomas points to *other* objections raised in the trial court, but none raised this issue. Had he objected on this ground, Sinclair could have introduced evidence about his relationship with the firm, possible assignments and so forth. It would be unfair to explore these issues for the first time on appeal.

In any event, the judgment names Sinclair *and his current firm* and we fail to see how Thomas has been harmed. He will not have to pay twice to satisfy the judgment.

2. Oral Modification of Contract

Thomas contends the trial court should not have allowed Sinclair to prove the 1996 agreement because the 1990 agreement stated it would "govern all future services" unless changed in writing. Even if we agreed, no objection to the evidence about the 1996 agreement was lodged at trial. Inadmissible evidence can support a judgment where, as here, no objection is lodged. (9 Witkin, Cal. Procedure, *supra*, § 363, p. 413.) Further, we agree with Sinclair that the trial court could find the 1996

agreement was a novation, not an oral modification barred by the parol evidence rule. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 906-907, pp. 811-812; 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 106, p. 225.) The 1996 contract pertained solely to the appeal, and Sinclair's testimony and Thomas's payment of his balance and lack of objection to the new billing rate support the conclusion that the new agreement supplanted the old. (See *Producers Fruit Co. v. Goddard* (1925) 75 Cal.App. 737, 755.)

3. Evidence of False Promise

Thomas contends no substantial evidence supports the theory of an intentionally false promise. We disagree.

a. Performance

Pointing to the money he paid to Sinclair before escrow closed (about \$60,000 under the 1990 agreement and \$36,000 under the 1996 agreement), Thomas claims "As a matter of law, Thomas's substantial performance, before and after the alleged new promise, precluded proof of a promise made without any intention of performing it." The fact Thomas dribbled out payments to keep Sinclair from withdrawing does not negate his fraudulent intent to avoid other proper charges, or to recoup payments by means of a later frivolous malpractice action, at the time he induced Sinclair to handle the appeal. Thomas's argument about substantial performance is a factual one which did not persuade

the trial court, not a legal one which bars recovery by Sinclair, regardless of the other evidence.

b. Uncertainty

Thomas claims the 1996 agreement was "entirely uncertain." Sinclair told Thomas he would not handle the appeal because of his payment history, and would do so if and only if Thomas agreed to pay at the higher hourly rate the firm charged other clients and agreed to keep current on payments. Thomas promised to do this. We see nothing uncertain about this.

Thomas points to *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, for the proposition that a false promise must be pleaded or proven with specificity. Conrad claimed a bank officer promised to grant him a loan but then denied the loan, causing Conrad's bankruptcy. (*Id.* at pp. 140-141, 143.) In part we recited the general rule that "General and conclusory claims of fraud will not suffice" and in reviewing Conrad's claim found the bank had done no more than commit to entertaining a loan application. (*Id.* at pp. 156-157.) As stated above, there was no fatal uncertainty in Sinclair's testimony, which demonstrated a specific promise by Thomas to pay his bills promptly at the new, specified, hourly rate.

Contrary to Thomas's view, we find the cross-complaint was adequate to apprise him of Sinclair's claim. "Pleading facts in ordinary and concise language is as permissible in fraud cases

as in any others, and liberal construction of the pleading is as much a duty of the court in these as in other cases." (5 Witkin, Cal. Procedure, *supra*, Actions, § 670, pp. 127-128.) Cases emphasizing the need to allege fraud with clarity typically arise on *demurrer* rather than after a trial. (E.g., *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216-217.) After trial, a miscarriage of justice must be shown. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) No miscarriage is shown, even if there was error.

The cross-complaint pleads that when Sinclair was retained "for the appeal in or around December, 1996, THOMAS had no intention to pay the fees which would be incurred"; that Sinclair "acted in reliance" upon Thomas's "oral representation that he would pay his legal bills" and such reliance was reasonable; and Thomas's conduct "was fraudulent, willful, oppressive, malicious, and despicable . . . and done with the intent to injure" Sinclair. The fraud claim incorporated from earlier in the cross-complaint the facts that Thomas asked Sinclair to represent him in the appeal and the parties entered into an oral fee agreement, the provisions of which "were substantially identical to the terms and provisions of the written fee agreement" except as to hourly rate and that the new agreement covered the appeal. This was sufficiently specific to

inform Thomas of the gist of the fraud. Although on appeal he characterizes Sinclair's case as Protean, Sinclair's basic claim has remained constant.

Thomas asserts that the promise to pay bills promptly cannot be read to deprive a client of the right to contest an attorney's bill. We agree that Thomas had the right to raise billing errors, overbillings and malpractice – if he had any good faith belief such errors took place. But the evidence does not support this characterization of Thomas's actions.

c. Other Acts Evidence

Thomas contends the trial court should not have considered evidence of other malpractice actions. We disagree.

Evidence Code section 1101, subdivision (b) provides that evidence of past acts used to show a person's conduct on a specified occasion which would otherwise be inadmissible character evidence may be admitted "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, . . .) other than his or her disposition to commit such an act."

In the context of criminal insurance fraud, prior suspicious insurance claims are admissible both to prove knowledge of claims procedures and intent to defraud. (*People v. Foster* (1981) 114 Cal.App.3d 421, 433-434; *People v. Maler* (1972) 23 Cal.App.3d 973, 978-980; *People v. Furgerson* (1962)

209 Cal.App.2d 387, 390-391 [pre-Evidence Code case].)

Dissimilarity between current and past acts does not bar admission into evidence of the prior conduct to show intent and knowledge provided the similarity is close enough to permit the inference that the actor probably harbored the same intent.

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) That the prior disputes were different goes to the weight, not admissibility, of the evidence. (*People v. Furgerson, supra*, at p. 390.)

These rules apply in civil fraud cases. (See *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1033-1034; *Cobian v. Ordonez* (1980) 103 Cal.App.3d Supp. 22, 30.)

The trial court admitted the evidence we outlined earlier to show Thomas's knowledge of malpractice insurance procedures and his intent to exploit that knowledge by filing frivolous malpractice actions. It was admissible for those purposes.

In the reply brief Thomas states "the *only* similarity in the previous [malpractice cases] was that Thomas felt he was ill served by attorneys who failed to gain custody of his son, who caused him to suffer a \$535,000 default judgment and who practiced law without a license." This claim is not accurate. Not all of the cases involved the default or the custody matter, it was not shown the default was caused by anything other than Thomas's conduct, several of the cases were frivolous, and

Thomas knew McDonald was unlicensed but kept him as in-house counsel and controlled his actions.

Similarly, Thomas reargues matters going to the weight of Watt's damning testimony, but this does not make the testimony go away. This calls to mind one of our prior cases, involving a conviction for filing a false claim for a tax exemption. We upheld the admissibility of prior acts of welfare fraud and statements by the defendant regarding his willingness to "beat the racket," which showed "that defendant's attitude toward the 'system' was one of scorn and a willingness to engage in dishonest conduct to 'beat' the system. Such evidence would in turn tend to establish that in applying for the homeowner's tax exemption . . . defendant was again attempting to 'beat the system,' and therefore was intending to defraud the county by filing a false claim." (*People v. Rainville* (1974) 39 Cal.App.3d 982, 989-990.) So, too, here: The prior acts evidence, particularly Watts's evidence, showed Thomas's scorn for the judicial system and willingness to engage in dishonest conduct to extort money from lawyers. It was admissible.

d. Sinclair's Due Care

Thomas contends evidence of Sinclair's due care was not admissible because "*Sinclair's* conduct . . . could have no tendency to show *Thomas's* intent in December 1996."

Tendering a mistaken but colorable claim is different from tendering a sham claim. In addition to former Presiding Justice Puglia's testimony that "there is nothing in [the files of the underlying case] that would suggest remotely or from which it could be inferred, reasonably, that Mr. Sinclair did not comfortably meet the standard of care which is applicable to attorneys," he opined that a malpractice claim could not even survive summary judgment. There was not enough evidence for Thomas to pursue Rowland on an intentional tort theory, because Rowland had acted openly on the basis of legal advice. The law regarding offsets for the rental damages was settled. Sinclair's judgment to pursue specific performance "was spectacularly successful."

Justice Puglia's testimony showed that Thomas had no good faith reason to refuse to pay Sinclair's fees. The fact he raised a baseless malpractice claim pursuant to a scheme he had employed against other attorneys can be used with other evidence to infer his intent at the time of contracting in 1996.

e. Reliance

Thomas contends Sinclair did not rely on his false promise. This appears to be a claim that because Sinclair did not immediately seek to withdraw as Thomas's counsel upon the first post-1996 accrual of an arrearage, Sinclair did not rely on Thomas's promise to keep current. Sinclair testified that

absent Thomas's 1996 promise he would not have undertaken the appeal. That shows reliance. That Sinclair later failed to promptly insist on his rights under this agreement merely shows that, like most attorneys, he was tolerant of "slow pay" clients and focused more on the legal matters before his firm, leaving billing issues to others.

Thomas contends the 1996 agreement had to be in writing under State Bar rules. Thomas cites *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, involving a licensed real estate broker seeking compensation under an oral agreement, for the proposition that Sinclair "could not reasonably rely on an unenforceable oral promise of compensation." *Phillippe* held the broker could not have reasonably relied on an oral promise of compensation, because that promise was barred by the statute of frauds (Civ. Code, § 1624). (*Id.* at p. 1262.) *Phillippe* noted that a number of types of contracts had to be in writing, to protect consumers, citing as one example the State Bar Act. (*Id.* at pp. 1265-1266; see also *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [unlicensed contractor cannot "maintain any action for compensation" regardless of legal theory, to advance consumer protection purpose of licensing scheme].) Therefore, Thomas reasons that Sinclair could not reasonably rely on his oral promise. This logic has been accepted in the context of violation of rules requiring fee

sharing agreements to be in writing. (*Chambers v. Kay* (2002) 29 Cal.4th 142, 156-161.)

Thomas predicates his argument on the mistaken premise that the oral fee agreement violated the State Bar Act. Sinclair testified State Bar rules allowed him to contract with Thomas without a written agreement, based on his existing attorney-client relationship. The requirement of a written fee agreement does not apply to "An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client." (Bus. & Prof. Code, § 6148, subd. (d)(2); see 1 Cal. Practice Guide: Professional Responsibility (The Rutter Group 2002) Attorney Fee & Fee Agreements, §§ 5:611-5:612, p. 5-81.) Sinclair provided legal services through posttrial motions in *Thomas v. Rowland* pursuant to the 1990 written contract. Pursuant to the oral contract, he agreed to defend the favorable judgment in *Thomas v. Rowland* in this court. That was the "same general kind" of services for which Thomas had been paying Sinclair under the written contract. Thomas's failure to show a written contract was required on these facts defeats his contention.

Thomas contends that because the hourly rate changed, the agreement had to be in writing. The fact the rate changed does not change the fact that the "same general kind" of legal

services were to be rendered. *Severson & Werson v. Bolinger* (1991) 235 Cal.App.3d 1569, relied on by Thomas at oral argument, is distinguishable. That case involved an attorney who increased the hourly rate without notice and claimed entitlement to it because the client had signed an agreement to pay the "regular" rate charged by the attorney. Because fee agreements must be construed against attorneys, there can be no rate change in the absence of client consent. (*Id.* at pp. 1572-1573.) The trial court in this case credited the evidence showing Thomas had agreed to the hourly rate change.

C. Substantial Evidence Supports the Damages Awarded

Thomas claims the damages awards are "excessive," but except as to punitive damages he does not challenge the *amount* of the awards, he contends they are not legally proper. He also states tort damages are not available "for bad faith breach of contract," a point conceded by Sinclair.

1. Fees Defending the Spurious Malpractice Claim

Thomas attacks the award of \$134,018, which represents the fees spent defending Sinclair from the malpractices suit, not any fees spent in pursuing Sinclair's cross-complaint for fraud. We conclude the award was properly made as part of the damages resulting from Thomas's fraudulent scheme. That scheme called for Thomas to prosecute a malicious civil action. We will first conclude the award may be sustained on the theory of malicious

prosecution, then we will conclude it was proper on a pure fraud theory. We need not address the trial court's prophylactic award of the same amount as fees for "vexatious" litigation.

a. Malicious Prosecution

Thomas's repeated theme is that by suing for fraud, Sinclair bypassed "the narrow and exacting requirements of the disfavored cause of action for malicious prosecution," and asserts that "Evidence was not presented (nor was discovery conducted)" on that theory. Although Thomas acknowledges Sinclair could have amended the cross-complaint to allege malicious prosecution upon Thomas's dismissal of the complaint (*Loomis v. Murphy* (1990) 217 Cal.App.3d 589, 593-595), he complains that because Sinclair did not so amend the cross-complaint, no malicious prosecution theory can be advanced on appeal. In our view, the failure to amend the cross-complaint was procedural error which caused no prejudice. The trial embraced all of the elements of a malicious prosecution claim and those elements were amply proven. Thomas was not surprised at Sinclair's theory and he would not have done anything differently had other nomenclature been used.

Although malicious prosecution is often loosely called a "disfavored" tort, that disfavor is built into the elements of the tort, which, if proven, allow recovery. (See *Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-874 [declining

to loosen "traditional limitations" on the tort] (*Sheldon*).) As Witkin has pointed out, calling it a "'disfavored'" cause of action adds nothing to the analysis of its elements in a given case. (5 Witkin, *Cal. Procedure, supra*, Pleading, § 706, pp. 166-167.) "[W]here the difficult burden of proof is met by the plaintiff, recovery is allowed. . . . [W]e should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff [T]he public policy involved has properly served, over many years, to crystallize the limitations on the tort, and the defenses available to the defendant. Having served that purpose, it should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by [malicious prosecution]." (*Jaffe v. Stone* (1941) 18 Cal.2d 146, 159-160.)

"The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will,

often magnified by slanderous allegations in the pleadings. In recognition of the wrong done the victim of such a tort, settled law permits him to recover the cost of defending the prior action including reasonable attorney's fees [citations], compensation for injury to his reputation or impairment of his social and business standing in the community [citations], and for mental or emotional distress[.]” (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50-51 (*Bertero*).) “[T]he ‘disfavored action’ concept stems from public policy pertaining to the enforcement of the criminal laws. [Citation.] Public policy, however, does not limit the right to seek redress for the malicious abuse of the judicial process; such abuse cannot be sanctioned either in the assertion of affirmative claims in initiating proceedings or in the affirmative assertion of such claims after the initiation of proceedings.” (*Id.* at p. 53.)

A plaintiff must prove that the civil action (1) terminated in plaintiff’s favor; (2) was brought without objective probable cause; and (3) was brought with subjective malice. (*Sheldon, supra*, 47 Cal.3d at pp. 871-872, 874, 878-881.) Lack of probable cause is shown where no “reasonable attorney would have thought the claim tenable.” (*Id.* at p. 886.) Malice is shown where suit is brought out of ill will or “some ulterior purpose distinct from that of enforcement of the alleged cause of action.” (5 Witkin, Summary of Cal. Law,

supra, Torts, § 450, p. 534; see *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494.) Where a party's behavior is "clearly unreasonable," lack of probable cause implies malice. (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1466-1467 [negligent research does not show malice].)

The evidence credited by the trial court overwhelmingly establishes each of these elements. The complaint was dismissed and Justice Puglia's testimony showed it had no colorable basis. Malice is shown by the utter lack of merit in the claim, by Thomas's prior frivolous malpractice actions and by his bragging to Watts in 1997 (shortly after the 1996 oral agreement) that it was easy to cheat lawyers out of their fees. Sinclair proved that Thomas sued him for the purpose of coercing a reduction of fees and not because he had any good faith belief that Sinclair had churned or bungled the case. That is malicious prosecution.

Therefore, even if, as Thomas suggests, the fees incurred defending the spurious malpractice case were not recoverable as fraud damages, we would not reverse that portion of the award. This is because the evidence accepted by the trial court shows Sinclair was entitled to those damages on a different theory and therefore no "miscarriage of justice" has been shown. (Cal. Const., art. VI, § 13, Code Civ. Proc., § 475; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-108.) This conclusion also applies to Thomas's later claim that none of the

damages were connected to the fraud, but "would be recoverable, if at all, only in a malicious prosecution action."

Thomas requests judicial notice of a malicious prosecution complaint Sinclair filed against Thomas, Lund and Beck after Thomas filed his opening brief. (*Sinclair v. Thomas*, Alameda Co. Super. Ct. No. 01-027798.) Thomas alleges Sinclair is seeking recovery in that action for the same damages awarded in this action, and that action should provide the proper forum to litigate the dispute *inter sese*. It may be that this judgment will bar that action as to him, and his remedy may be to seek abatement or, after finality of this decision, perhaps seek dismissal based on *res judicata*. But it would be a miscarriage of justice to force Sinclair to relitigate the malicious prosecution elements already proven as components of this fraud action. Because the pendency of that action does not alter our analysis, we deny the request for judicial notice.

We reject Thomas's view that Sinclair's filing of that suit was either an effort to gain a double recovery or that it is an effective concession of the lack of merit of Sinclair's fraud theory. Given the unusual facts, Sinclair's filing of a separate malicious prosecution lawsuit against Thomas was an objectively wise and appropriate prophylactic tactic, not an improper effort to secure a duplicative recovery.

b. Defense Fees as Consequential Damages

Thomas contends the American Rule requires each party to pay his own attorney fees, except where a statute otherwise provides, therefore the trial court should not have awarded the malpractice defense fees as fraud damages. Although we have upheld that award on other grounds, we address the claim.

The costs of defense of the malpractice case were recoverable as consequential damages caused by Thomas's fraud. "Recovery in an action for deceit for fraudulently inducing a contract includes the expense of *other litigation* incident to the contract *as part of consequential damages.*" (*Kass v. Weber* (1968) 261 Cal.App.2d 417, 423.) This is sometimes referred to as the "tort of another" or "third party tort" rule, which allows recovery of fees of litigation with third parties caused by the defendant's tortious conduct. (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 112; Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2001) § 9.4, p. 227 (Pearl).) However, where the point of the fraud is to foment *first party* litigation, the doctrine is properly expanded.

"The 'tort of another' doctrine, rather than being an exception to the rule that parties must bear their own attorneys' fees, is an application of the usual measure of tort damages. 'The . . . attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be

part of the damages in a personal injury action.'" (7 Witkin, Cal. Procedure, *supra*, Judgment, § 147, p. 662; Pearl, *supra*, § 9.5, p. 229.) We think it will be a rare case, such as this one, where the direct (and intended) consequence of a fraud will be other litigation between the cheat and the victim. Here, Thomas knew he would cause Sinclair malpractice litigation expenses (unless Sinclair caved in immediately) and the threat of such expenses is part of his standard arsenal. (See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1188-1189 [the "in terrorem effect of uncertainty [about litigation expenses] should not be underestimated"].) Nor should Thomas be insulated from paying for "all the detriment proximately caused" by his fraudulent behavior. (*Salahutdin, supra*, 24 Cal.App.4th at p. 568; see Civ. Code, § 1709.) Because the "tort of another" rule is but a shorthand summary explaining the basis for an item of damages caused by a party, we apply it herein.

c. Vexatious Litigant Doctrine

Thomas contends the trial court had no authority to award Sinclair's malpractice defense fees as a sanction for his vexatious lawsuit, asserting a trial court must utilize one of the specific statutory schemes when imposing fees as a sanction. (See Pearl, *supra*, § 7.1, p. 182.) There are statutory procedures for an award of fees for frivolous actions and

filings, including a 30-day "safe harbor" provision. (*Id.*, §§ 8.24-8.33, pp. 216-220.) Sinclair did not employ them.

But the trial court ruled the "vexatious" fee award would only become operative if this court reversed the award of fees as a component of fraud damages. We affirm that award and therefore need not address the award of fees *qua* fees.

2. Emotional Distress Damages

On appeal Thomas contends the award of \$50,000 for emotional distress "was excessive as a matter of law." This claim is predicated on the view that Sinclair claimed those damages "for breach of a contract to pay [his] fees."

Mental distress damages may be awarded if caused by a fraudulent scheme. (See *Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 921; *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 554.) Also, the award was not merely for "upsetting" Sinclair, as Thomas states it was for loss of reputation, which may be awarded in malicious prosecution actions (*Ray Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18 (*Ray Wong*); *Grindle v. Lorbeer, supra*, 196 Cal.App.3d at p. 1467; *Davis v. Local Union No. 11, Internat. etc. of Elec. Workers* (1971) 16 Cal.App.3d 686, 695-696), and that was the essence of the fraud. Thomas knew many lawyers will settle baseless suits to protect reputation, and Sinclair testified how

his community standing suffered. This supported an award and Thomas does not claim \$50,000 was too much.

3. Lost Time Damages

Thomas contends the award of \$33,610 for time spent defending the malpractice suit was excessive. Again, he does not dispute the amount, he disputes whether any award is possible. He relies on *Trope v. Katz* (1995) 11 Cal.4th 274 (*Trope*), where the California Supreme Court held that an attorney is not entitled to recover fees when he acts as his own counsel in a contract case. The fortuitous circumstance that a party was an attorney acting in propria persona did not entitle that party to fees under Civil Code section 1717. (*Id.* at pp. 278-292.)

Sinclair was not in propria persona at any time in this litigation and he did not claim any fees for his *legal work* defending this case. He is seeking compensation for his hours lost to his law practice. This is in effect a lost income or profits claim. That such may be caused (and intended) by Thomas's unique brand of fraud is shown by the testimony of two of his other victims, each of whom also lost time defending his frivolous claims. Lost profits are awardable in ordinary fraud cases. (*Stout v. Turney, supra*, 22 Cal.3d at p. 726.) Lost time is awardable in malicious prosecution cases. (*Ray Wong,*

supra, 199 Cal. at p. 18.) Thomas has not shown error or prejudice.

4. Malpractice Premiums

Thomas claims the award of increased malpractice premiums was based on speculation. Sinclair testified credibly to a yearly increase of \$3,600, to last for eight years, amounting to \$28,800. That was not speculation.

5. Punitive Damages

The trial court awarded \$690,000 in punitive damages, three percent of Thomas's minimum net worth of \$23,000,000, while acknowledging evidence his wealth may be larger.

Thomas states there was no evidence of malice. We agree with Sinclair that this contention is based on an evaluation of the evidence in Thomas's favor. We must view the evidence in favor of the judgment. (*Bancroft-Whitney Co. v. McHugh*, *supra*, 166 Cal. at p. 142.) We must also accept that Thomas's testimony does not determine the question of his mental state:

"The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

(*U.S. Postal Service Bd. of Govs. v. Aikens* (1983) 460 U.S. 711, 716-717 [75 L.Ed.2d 403, 411].)

For the reasons explained above, malice was amply shown. Thomas intended to cheat Sinclair and used his intellect to create a plausible basis for a malpractice claim, such as by sending letters questioning litigation moves he had approved. He has a history of perpetrating his unique way of cheating lawyers and boasted about how easy it was. Malice was shown.

Thomas argues the award is too large. In our view the award is more vulnerable to the claim that it is too *small* given the nature of Thomas's misconduct, his repetitive use of the courts for base purposes against lawyers, and the great wealth which gives him the power to commit these acts, including by his employment of economically dependent in-house lawyers to do his bidding, thereby evading the vexatious litigant procedures. In our view the award of \$690,000 is certainly not too *large*.

"The function of punitive damages is not served if the defendant is wealthy enough to pay the award without feeling economic pain. [Citation.] Nevertheless, the award must not be so great that it exceeds the level necessary to punish and deter." (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581.) We will reverse an award if it is "excessive as a matter of law or is so grossly disproportionate to the ability to pay as to raise a presumption that it was the result of passion or prejudice." (*Id.* at p. 583.) We are guided by three factors: (1) the reprehensibility

of the actor's conduct, (2) the relationship between the conduct and harm the actor *might have caused* (not *did cause*), and (3) his wealth. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 623 (*Rufo*); *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1161-1162 & fn. 15; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166.) There is no formula which dictates when an award is excessive. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1539-1540.)

Thomas has not shown any of the factors militate in his favor. Thomas claims the award is 33 times the \$20,000 in fees at issue. But Thomas contested *all* of the billings, about \$120,000. More importantly, the relevant amount was the damages caused (or likely to be caused) by Thomas's fraud (nearly \$250,000) and the punitive award was less than three times this amount. It was only three percent of his *minimum* net worth, although there was evidence he was worth much more.

Thomas minimizes the reprehensibility of his conduct, characterizing this award as a windfall for predatory attorneys. Again, we must view the evidence in the light favorable to the judgment. We find this case similar to a case involving "filing fabricated claims in order to coerce [the victim] to settle or abandon a legitimate claim," in which the California Supreme Court stated "This flagrant abuse of the judicial process is precisely the type of tortious conduct that an award of

exemplary damages is designed to deter. The vast wealths of the defendants warrant a large award." (*Bertero, supra*, 13 Cal.3d at p. 65; see *Rufo, supra*, 86 Cal.App.4th at p. 625.) In light of Thomas's behavior, his wealth, the damage he caused, and the need to protect others, the award was not excessive.

DISPOSITION

The judgment is affirmed. Thomas shall pay Sinclair's costs of this appeal. (Cal. Rules of Court, rule 27(a).)

MORRISON, J.

We concur:

DAVIS, Acting P.J.

CALLAHAN, J.